Supreme Court, U. S.
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No. 77-145

In the Supreme Court of the United States

OCTOBER TERM, 1977

EDGAR T. CRISMON, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION TO DISMISS

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MOTION TO DISMISS

Appellant seeks review of the decision of the court of appeals dismissing his suit for refund of federal income taxes for 1966 for lack of jurisdiction, on the ground that he had not filed a proper claim for refund within the statutory period. Since this case does not meet the requirements of 28 U.S.C. 1254(2) or any other statute conferring appellate jurisdiction on this Court, the appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari under 28 U.S.C. 2103, the petition should be denied.

On March 6, 1973, appellants filed with the Internal Revenue Service a completed Treasury Form 1045 (Application for Tentative Refund from Carryback of Net Operating Loss or Unused Investment Credit), which claimed a $6,858 decrease in tax for 1966 resulting from a carryback to that year of a $19,186 net operating loss in

1969 (R. 2, 16-17, 41; J.S. A-12 to A-13).[1] By certified letter dated April 12, 1973, the Internal Revenue Service informed appellant that his application for a tentative carryback adjustment was denied because it had not been filed within 12 months after the end of the tax year (1969) in which the net operating loss occurred (R. 18).

About five months later taxpayer filed a claim for refund (Treasury Form 843) for $6,858, which the Internal Revenue Service received on September 24, 1973 (R. 19; J.S. A-14). By certified letter dated October 26, 1973, the Service notified appellant that his claim for refund was denied because the three-year statute of limitations for filing a claim based on a net operating loss for 1969 had expired on April 15, 1973 (R. 22).

Appellant thereafter instituted together with his wife this suit for refund in the United States District Court for the District of Arizona, claiming that their untimely application for a tentative carryback adjustment (Form 1045) should have been treated as an "informal" claim for refund sufficient to withstand the bar of the statute of limitations (R. 41-47). The district court dismissed the complaint, and the court of appeals affirmed. They held that an application for a tentative carryback adjustment is not a claim for refund because Section 6411(a) of the Internal Revenue Code, Treasury Regulations on Income Tax, Section 1.6411-1(b)(2), and the instructions accompanying Form 1045 all state that an application for a tentative carryback adjustment is not a claim for credit or refund (J.S. A-5 to A-6).[2]

The decision of the court of appeals is correct and is in accord with the other courts that have considered the issue. See *Rock* v. *United States*, 279 F. Supp. 96 (S.D. N.Y.);

[1]"R." refers to the duplicated record filed in the court of appeals.

Schrader v. *Internal Revenue Service*, 35 A.F.T.R. 2d 686 (W.D. Ky.), decided January 17, 1975. Section 6411(a) of the Code provides that "[a]n application * * * [for a tentative carryback adjustment] shall not constitute a claim for credit or refund." The reason that an application for a tentative carryback adjustment is not treated as a claim for refund is because they involve completely different procedures.

For example, the issues presented by an application for a tentative carryback adjustment are solely computational, *i.e.*, the taxpayer's reported net operating loss and the accuracy of his prior tax returns are, for purposes of the tentative adjustment, assumed to be correct. But the Internal Revenue Service does not make such assumptions in considering a claim for refund. Moreover, unlike disallowance of a claim for refund, the Service's disallowance of a tentative carryback adjustment (in whole or in part) is final and cannot be challenged in any proceeding. See Treasury Regulations, Section 1.6411-3(c).[3] Finally, a taxpayer can file a claim for refund (or credit) based upon a net operating loss carryback regardless of the Internal Revenue Service's treatment of his application for a tentative carryback adjustment.

In view of the statutory and regulatory differences between a tentative carryback adjustment and a claim for refund, the courts below correctly rejected appellant's contention that his application for a tentative carryback adjustment be treated as a claim for refund.

[2]See also H.R. Rep. No. 849, 79th Cong., 1st Sess. 23 (1945), which states that "[a]n application for a tentative carry-back adjustment is not to constitute a claim for credit or refund."

[3]As Form 1045 indicates, an allowance of a carryback adjustment is "tentative" only.

United States v. *Kales*, 314 U.S. 186, upon which appellant relies (J.S. 12-14), is not to the contrary. There, the Court held that a letter could constitute an informal claim for refund where (1) the Commissioner was fairly advised as to the nature of the taxpayer's claim and treated the letter as a claim for refund, and (2) the defects or irregularities were "formal" in nature (314 U.S. at 194). Here, however, the application for a tentative carryback adjustment did not advise the Commissioner of the substantive nature of appellant's claim. Indeed, in denying the application, the Commissioner advised appellants (R. 18) that the document was not a claim for refund and that their recourse was to file a proper claim for refund.

Furthermore, appellants do not meet the second requirement of *Kales*. As we have pointed out *supra*, p. 3, the differences between an application for a tentative carryback adjustment and a claim for refund are substantive and not merely formal in nature. See *Rock* v. *United States*, *supra*, 279 F. Supp. at 98-99.

The appeal should be dismissed. Treating the appeal as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1977.

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